

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

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CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY *DM*
DEPUTY

UNITED STATES OF AMERICA

-vs-

CAUSE NO. A-13-CR-346-SS

MICHAEL BAKER (1)

ORDER

BE IT REMEMBERED on this date, the Court received “SEC’s Motion to Quash Baker’s Subpoena on SEC Attorney James Etri to Produce SEC Documents” [#493 filed 7/31/17]. At the same time, the Court received “Michael Baker’s Opposition to SEC’s Motion to Quash Subpoena on James Etri” [#496 filed 8/1/17]. On July 20, 2017, the Court held a teleconference in this case and subsequently confirmed its oral pronouncements from the hearing in writing:

IT IS FURTHER ORDERED that Defendant Baker’s Motion to Compel Disclosure on Etri Impeachment Material, Including SEC Action Memoranda [#472] is GRANTED IN PART with the stipulation that James Etri, the Securities and Exchange Commission (SEC) attorney who ran the SEC’s ArthroCare investigation, will not be called as a witness by the Government, unless possible Brady materials—specifically any relevant SEC action memoranda—are sealed and disclosed to the Court for *in camera* review prior to Etri’s testimony;

Order [#483]. Counsel for the SEC was present (telephonically) at the July 20, 2017 hearing. The United States, specifically, the Department of Justice, has not advised counsel for Baker, nor this Court, whether Mr. Etri will be called as a witness.

At issue here, Baker served a subpoena on the SEC, requesting “all documents, such as memoranda written and received by Mr. Etri, relating to the SEC’s investigation of ArthroCare up to the filing of the SEC’s original complaint. In particular, it should include ‘the action memoranda’



written by Mr. Etri or his staff regarding the enforcement actions against Michael Baker, Michael Gluk, John Raffle, and David Applegate.” Mot. Quash [#493-2] Ex. 2 (Subpoena). The SEC refuses to comply.

The trial between the United States Government and Michael Baker—a retrial in this case—is scheduled to span multiple weeks. The jury will be selected on August 7, 2017, and trial will run until concluded. The first trial involving the prosecution of Michael Baker took between three and four weeks to try. The undersigned does not intend to stop the forthcoming second trial during its progress if the prosecution decides to call Mr. Etri as a witness and recess until the SEC provides the Court with the relevant documents for *in camera* review. It is impractical to suggest the Court should delay trial to enable Mr. Etri, the Justice Department, and this Court to review all of the SEC’s documents to select what *Brady* materials or other materials must be disclosed in this criminal trial.

To date, the SEC has refused to share information with the Department of Justice lawyers who are prosecuting this case for unknown reasons. Apparently, the SEC contends it is not part of the government of the United States of America under the circumstances. Significantly, the SEC has its own case pending in this Court against Michael Baker, and the conclusion of the SEC’s civil case is dependent upon the conclusion of the criminal trial.

Accordingly,

IT IS THEREFORE ORDERED that the Securities and Exchange Commission shall have its authorized representative with all documents described in the subpoena and this Court’s prior Order [#483] in his or her possession present in Austin, Texas, from the date of the jury selection in the forthcoming trial until the end of the presentation of evidence both

from the Government and Mr. Baker. The Court has already ruled that Mr. Etri will not testify unless the Court has reviewed the SEC documents to determine whether *Brady* information or other information needs to be disclosed to counsel. The undersigned has no understanding whatsoever why the SEC continues to attempt to jeopardize this criminal trial. The information, if any, necessary for disclosure under *Brady* or any other authority is years old and not material to any ongoing matter except A-12-CV-285, which is pending in this very Court;

IT IS FINALLY ORDERED that the Department of Justice counsel charged with the responsibility of prosecuting Baker shall have Mr. Etri available during the entirety of forthcoming criminal trial. If Mr. Etri is to be called as a witness, the Justice Department lawyers are charged with reviewing the SEC's documents described in the subpoena and this Court's prior Order [#483] and producing those documents for *in camera* inspection without substantially delaying this trial, which is only six days away.

SIGNED this the 1st day of August 2017.



SAM SPARKS
UNITED STATES DISTRICT JUDGE